

EXHIBIT

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CONFIDENTIAL

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
CIVIL ACTION NO. 1:17-cv-00854-TDS-LPA

REBECCA KOVALICH and SUZANNE)
NAGELSKI,)
)
Plaintiffs,)
)
vs.)
)
PREFERRED PAIN MANAGEMENT & SPINE)
CARE, P.A., DR. DAVID SPIVEY,)
individually, and SHERRY SPIVEY,)
individually,)
)
Defendants.)
_____)

VIDEOTAPED DEPOSITION

OF

DAVID SPIVEY, M.D.

At Raleigh, North Carolina

Friday, August 10, 2018

REPORTER: VONDA L. REED, CVR-M
Notary Public

REED & ASSOCIATES
2401 Whirlaway Court
Matthews, NC 28105
980-339-3575

1 Q. When did that conversation take place?

2 A. Oh, in the past week or two.

3 Q. About how long did it last?

4 A. Five minutes each, on each subject.

5 Q. What did you talk about with Mary Benton?

6 A. I talked with her mostly to get in my mind sort of
7 time frames and dates and so on about when we had
8 talked about the effects that -- I'm sorry. Was the
9 question when did I talk with her or --

10 Q. What did you talk about?

11 A. -- what was it about? Sorry. Excuse me.

12 Q. That's all right.

13 A. Let me regroup. Exactly when we began to discuss the
14 need for reorganization and cost savings as we began
15 to feel the effects of a number of factors that were
16 impacting the practice from a reimbursement
17 standpoint and also from a volume standpoint, because
18 the large players in the area, Wake Forest Baptist
19 Health, who had established a pain practice sometime
20 before, we had seen a falloff in referrals from their
21 physician offices. And also, more recently, Novant
22 Health has established a pain practice, and they are
23 referring within their organizations.

24 And so referrals have fallen off, so volume
25 has fallen. We've, over the past, since beginning

1 around 2015, have had to make significant reductions
2 in personnel and reassignment of duties and just
3 trying to keep the practice profitable and survive.
4 So I discussed some of that with her, about when all
5 that had occurred, and that's pretty much it.

6 Q. When did you have that conversation with Mary Benton?

7 A. I can't tell you exactly when, but it's been over a
8 period of weeks off and on. I would think of
9 something and just ask her, you know, "Hey, when did
10 this happen?" and so on.

11 Q. Sure. How -- well, it was just probably hard to put
12 a time on it because it was --

13 A. Total time?

14 Q. Yeah, if you had to --

15 A. Sorry. I'm supposed to let you ask the question.

16 Q. No, that's all right.

17 A. So do it.

18 Q. Yeah. About how much total time do you think you
19 spoke with Mary Benton about -- to prepare for your
20 deposition for today?

21 A. 30 minutes to an hour. Maybe longer. I'm not sure.

22 Q. All right. What did you discuss with Sherry Spivey
23 related to your deposition?

24 A. Oh. Again, trying to firm up in my mind dates when
25 certain people came on board and when things

- 1 A. 1970.
- 2 Q. What did you do after you graduated from high school?
- 3 A. Matriculated at the University of North Carolina at
- 4 Greensboro.
- 5 Q. Did you graduate from there?
- 6 A. I did.
- 7 Q. What year?
- 8 A. 1976, B.A., biology; 1977, M.A., biology.
- 9 Q. After you got your M.A. in biology, then what did you
- 10 do?
- 11 A. Matriculated at the University of North Carolina
- 12 School of Medicine.
- 13 Q. And did you start that in '77 as well?
- 14 A. Yes.
- 15 Q. When did you graduate?
- 16 A. 1981.
- 17 Q. After you graduated from UNC, what was your kind of
- 18 first job? Or maybe -- did you start working while
- 19 you were at UNC for a hospital or clinic or something
- 20 like that?
- 21 A. No.
- 22 Q. Okay. What was your first job?
- 23 A. If you consider internship and residency a job -- I
- 24 guess I was paid, so I went to San Diego, to Mercy
- 25 Hospital, to do a rotating or flexible internship.

1 or the other of those surgery centers. And so that
2 was the nature of my practice at that time.

3 Q. What was the name of your pain practice?

4 A. PMS, Pain Management Specialists of Oklahoma. Kind
5 of a bad choice, huh, PMS.

6 Q. Was that the first practice that you had set up?

7 A. Yes.

8 Q. And did you have employees?

9 A. I had one.

10 Q. Who was that?

11 A. I can't remember her name. She was a nice older
12 woman who Robin and Sean had recommended, who had
13 worked for them in the past. I wish I could remember
14 her name. She basically did the scheduling and
15 billing, which was very rudimentary compared to what
16 exists now in my practice. Anyway.

17 Q. In 2005, what did you do then?

18 A. 2005, I went to -- came back to North Carolina and
19 joined, as a 1099 employee, a pain practice in the
20 Conover area, the name of which is Pain Relief
21 Centers; owner, Hans Hansen.

22 Q. Why did you come back to North Carolina?

23 A. Both Sherry's and my parents -- well, my mother has
24 been dead for years. But my father was aging and had
25 had lung cancer, and his health was failing. My

1 A. Yes, Nathan Hull.

2 Q. Nathan Hull.

3 A. Hull & Chandler, I think, is the name of the firm.

4 It's actually a firm to whom I was referred by

5 Ms. Kovalich at one time.

6 Q. Where is it located?

7 A. Charlotte.

8 Q. Hull & Chandler. Do you know what part of Charlotte?

9 A. I do not.

10 Q. Tell me about your current job responsibilities at

11 PPM. Like, describe just broadly what you do.

12 A. I review referrals as they come in to assess their
13 appropriateness for the practice, and then have my
14 new patient scheduling person schedule them. At that
15 time, I will assign them to either be seen by me or
16 one of the other practitioners.

17 I see patients on a daily basis, both new
18 patients and in follow-up; manage their pain
19 pharmacologically and nonpharmacologically through
20 bracing, interventional procedures, referral for
21 physical therapy, referral for surgery. Do
22 interventional procedures such as epidural steroid
23 injections, transforaminal epidural steroid
24 injections, diagnostic radio -- diagnostic injections
25 of the lumbar facette joints, both cervical and

1 lumbar. A number of different interventional
2 procedures to treat pain that is -- 90 percent of any
3 pain practice relates to the spine, either pain in
4 the spine or pain emanating from the spine -- up to
5 and including spinal cord stimulator trials,
6 kyphoplasties for vertebral compression fractures,
7 all done in the office.

8 So my day is spent running around seeing
9 patients, doing procedures, answering messages about
10 different questions that come to me over the
11 electronic health record from clinic people and other
12 people about a patient who, for example, couldn't get
13 their drug covered because of insurance issues and
14 what other drug could we prescribe, and different
15 things like that.

16 I mean, I also -- any entrepreneurial
17 additions to the practice, anything that we might
18 want to add. For example, right now BlueCross
19 BlueShield and other commercial payors are now, just
20 out of the blue, as of July 1st, requiring four weeks
21 of physical therapy as a part of their medical policy
22 that they just arbitrarily changed on July 1 that
23 requires four weeks of physical therapy before you
24 can even do something as simple as a single
25 injection. Most of those medical policies have very

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2 Q. Any Medicaid?

3 A.

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9 Q. Sure. All right. Getting back to your day-to-day,
10 do you manage -- well, let me back up. Are you the
11 owner of PPM?

12 A. Yes.

13 Q. Do you have any other titles that you've given
14 yourself as the owner/president; I mean, just --

15 A. I don't know if I agree with the term "given myself,"
16 but I don't know who else would have given it to me.
17 I'm referred to as president and CEO.

18 Q. Okay. That's what I was asking. Yeah, and I
19 wasn't -- since you're the owner, I wasn't trying to
20 be disparaging with that, but I don't know who else
21 would do it.

22 A. I understand.

23 Q. So as the owner, president, and CEO of PPM, would it
24 be fair to say, with just running the clinic, the
25 buck stops with you? Is that fair?

1 A. I guess so, yeah. Everything stops with me if I'm
2 the president and CEO.

3 Q. Yeah. And are you involved in personnel decisions?

4 A. Sometimes, yes.

5 Q. Tell me about that.

6 MS. SMITH: That's kind of a broad question.

7 Q. Sure. How are you involved in personnel decisions?

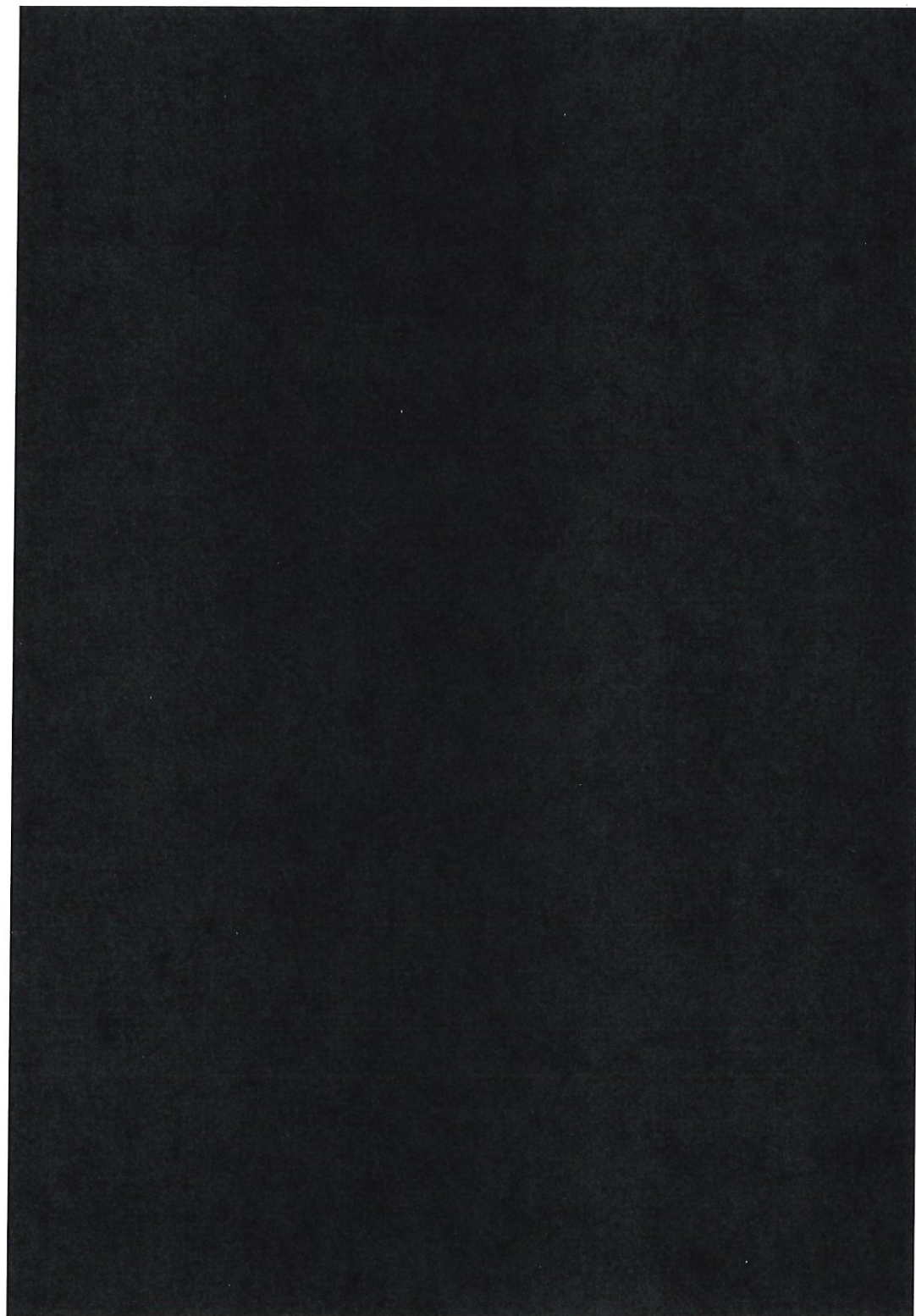
8 A. Well, particularly, if it is a person who has
9 applied -- do you mean for hiring, for example?

10 Q. Yeah. Let's go with hiring first.

11 A. Let's say we have a position open in the clinic for a
12 medical assistant, and I delegate all of the search
13 for that person and -- for example, Wendy, HR, may
14 get a number of applicants, and she'll get their
15 resumes and she'll bring them to me, and I'll look
16 them over. And I may be involved in the process that
17 early on, saying, "Well, I don't think this is a good
18 fit," or "Based on education and experience, this
19 might be a good one."

20 Then that person will be brought in and
21 interviewed by the appropriate head in the case of
22 the clinic. Sherry Spivey might be involved. The
23 clinical -- I can never remember the terms, clinical
24 director versus clinical manager. I can never keep
25 those two straight. Sorry. But, anyway, Sherry

1 A.
2 Q.
3 A.
4 Q.
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1 truthful until they convince me otherwise. And I
2 have no reason to believe that Scarlet would lie, but
3 all I know is, if she says that she wasn't given any
4 train- -- again, I don't know what she has said. If
5 she says she was given no training on PrognoCIS, that
6 is an untruth.

7 Q. When you say "on PrognoCIS," that is the same exact
8 thing as EHR?

9 A. Correct. That's our EHR.

10 Q.

11 A.

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13 Q.

14 A.

15 Q.

16 A.

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22 Q. Why was it rapid and necessary?

23 A. The reorganization?

24 Q. Yes.

25 A. Beginning in, actually, late 2014, but on through

1 2015, we began to not only see reimbursement drop,
2 not only in the lab, but in other CPT -- other areas
3 as well. We also would get these notifications from
4 commercial carriers and also from Medicare. And I'm
5 going to paraphrase, if I may, because I can't quote
6 them. "By the way, July 1st, we're going to be
7 cutting your reimbursement for filling in the CPT
8 code by X amount." In particular, they were
9 targeting urine toxicology testing, which was, as
10 mentioned yesterday, at one point over half of our
11 revenue.

12 So we knew -- and they were going to be very
13 aggressive about it. And they told us they were
14 going to be aggressive about it. And so we knew that
15 we had to get leaner very quickly. And at the same
16 time, we're still going through the process of
17 implementing the EHR and everything, and so it was a
18 major reorganization.

19 Q. Yesterday, your wife testified that it's still
20 ongoing today. Do you recall that?

21 A. Yes, I do.

22 Q. Is that true?

23 A. Yes.

24 Q. So tell me how it's rapid.

25 A. Well, maybe it's not as rapid today as it was

1 during -- during late '15 on into mid '16, it was
2 rapid, because we were getting all of these
3 notifications, and we were already seeing, you know,
4 issues with revenue. We tried to support that and
5 ameliorate that somewhat by adding some additional
6 services. For example, biomarker testing was added.
7 That was another revenue stream.

8 So if you look back at our month-to-month
9 revenues, you know, it doesn't -- it may not show
10 this early on just dramatic drop, but we were
11 somewhat offsetting that with additional services.

12 I've lost track of your question now. Forgive
13 me.

14 Q. No, that's okay.

15 A. So you asked why it was rapid or why it's ongoing
16 today. Why it's ongoing today is for the same
17 reason. They continued to reduce -- as I mentioned
18 earlier in my testimony, not only has Wake Forest
19 Baptist Health formed a pain practice and reduced our
20 referral base, Novant has now also formed such a
21 practice and has reduced our referral base. All of
22 this happening at the same time that we've got
23 reductions in reimbursement. And costs don't go
24 down, by the way, you know, from vendors.

25 Q. Yeah. And going back to 2015, when Medicare started

1 changing their reimbursements, did you tweak what you
2 did with the UDT at all, like what you tested for,
3 that sort of thing?

4 A. Not in response to that, no.

5 Q. Did you tweak it at that point?

6 A. We did a lot of tweaking of not -- let me see here.
7 We did some tweaking in not what we were testing, but
8 there were changes. The urine toxicology testing was
9 in such a state of flux from the time we went into
10 it, like in 2013 -- we started looking into
11 confirmation testing, the LC-MS/MS, the big machine,
12 the million dollar machine or whatever, you know, way
13 back in 2012. Finally went active with it in '13.
14 And all during that time, and even up to almost to
15 present, it was very difficult to get information
16 from CMS and from the commercial carriers as well.

17 At one time, in fact, if I may digress just a
18 little bit, even on the -- not the confirmation
19 testing, which was a list of codes this long
20 (indicating), okay -- even on the screening testing,
21 you had to bill certain commercial carriers with
22 completely different codes and in a completely
23 different way than you had to bill Medicare, okay?
24 That was an evolving process.

25 At one point, they didn't even know what they

1 been in charge of choosing -- investigating and
2 selecting the electronic health record that we were
3 going to use in the practice. She had gone through a
4 process of bringing different vendors in to make
5 presentations, for which I would attend. She
6 developed spreadsheets showing the advantages and
7 disadvantages of each and what they could and
8 couldn't do.

9 For example, some of them, you could already
10 do electronic drug prescription, PrognoCIS being one
11 of them. Some of them couldn't. Some said they were
12 never going to make that available. Some said that
13 "By March of next year," for example, "we'll have
14 that available." That kind of thing. And also
15 looking at their support, their up-front cost, their
16 support teams and what they did as far as training.
17 We talked about training earlier. You know, how much
18 they would come in and do training of your employees
19 and so on. So she did all of that.

20 Then we made the decision to go with PrognoCIS
21 and had started doing the contracting and all. We
22 had moved our IT provider from Piedmont IT Solutions,
23 who, by their own admission, had never -- my
24 recollection is, had never done an EHR, and certainly
25 had not done one for -- I think they had never done

1 one at all, but had not done one for the size and
2 complexity of the one that we were going to do.

3 And so we had looked at other vendors, and
4 Jennifer Bailey had been involved in that. And we
5 had gone and visited on-site at least two, I believe,
6 IT providers. The one we chose, which is now called
7 Solace IT Solutions, was at that time called
8 Eastridge, and they were in downtown Winston-Salem.
9 They were a -- one of the reasons we chose them is
10 that the Prognosis systems is a Microsoft base --
11 based, and they were a -- I don't remember the
12 terminology -- a Microsoft-approved whatever. You
13 know, they were an IT company that had the
14 endorsement of Microsoft. And so we had chosen to go
15 with them.

16 So she had gone through all that. All of that
17 was done and we were ready for implementation of the
18 EHR. She had, a long time before that, made plans to
19 go to Europe -- I believe it was Austria -- for some
20 kind of biking tour or a bicycle race or something,
21 and was very vested in making that trip. And so,
22 unfortunately, that dovetailed with the time when we
23 were going to be implementing the EHR. So she had
24 gone and had come back, but while she was gone, we
25 had to implement the EHR, right?

1 So fortunately -- Mary Benton had not been too
2 involved at that point, but she had helped us move to
3 the new building and everything. And I knew that she
4 had -- she was also recommended by Ms. Kovalich and
5 introduced to her. She had great organizational
6 skills; Mary Benton did. For example, when we moved
7 from our old building to new, we didn't lose a single
8 day of work. It was in the middle of winter, the
9 coldest day of 2013, I believe it was. And
10 everything was numbered. It went just smooth. I
11 mean, didn't miss a single hour of clinic.

12 So I knew that she could do that sort of
13 thing. So when Jennifer Bailey took off and we were
14 kind of left in a lurch, she came in, at my request,
15 and organized the implementation of the EHR and
16 interfaced with Prognosis and arranged all of those
17 training sessions and so forth and so on.

18 And also interfaced with Solace IT Solutions,
19 Eastridge at the time. We had chosen the computer
20 systems and all that we were going to use for EHR in
21 each exam room and all that, but it hadn't been
22 installed. So she went through that process of
23 getting them installed and all that.

24 So basically, when Ms. Bailey came back, the
25 other major project that she had was -- hang on a

1 Austria or she was watching a bike race? What do you
2 remember about why she was going to Austria?

3 A. My recollection, she was riding. Whether it was a
4 race or not, I can't remember. But my recollection,
5 she was actually riding a bike.

6 Q. Do you recall the details of what she was going to
7 do?

8 A. No.

9 Q.

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11 A.

12 Q.

13 A.

14 Q.

15 A.

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21 Q. Let's go to Exhibit 59. It should be in your book.

22 A. Okay.

23 Q. Now, this was something that was reviewed yesterday,
24 but it's an e-mail chain that involves Michael
25 Jacobson and an employee named Sara Wilson. Do you

1 A. I've already answered that, sir.

2 Q. Do it again.

3 A. 

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6 Q. So did you fire a lot of the workers and brought in
7 younger, cheaper people. Is that what you did?

8 MS. SMITH: Objection. That's a
9 mischaracterization of his testimony.

10 MR. HERRMANN: I didn't --

11 Q. Answer the question. Is that what you did?

12 A. Would you repeat the question, please?

13 Q. Did you fire these older workers and bring in
14 younger, cheaper people to replace them?

15 MS. SMITH: Objection.

16 Q. Is that what PPM did?

17 MS. SMITH: Objection.

18 A. I don't know that we necessarily hired younger
19 people, but if we could find someone to do a job
20 adequately whose credentials qualified for that job,
21 then obviously we would do that, yes.

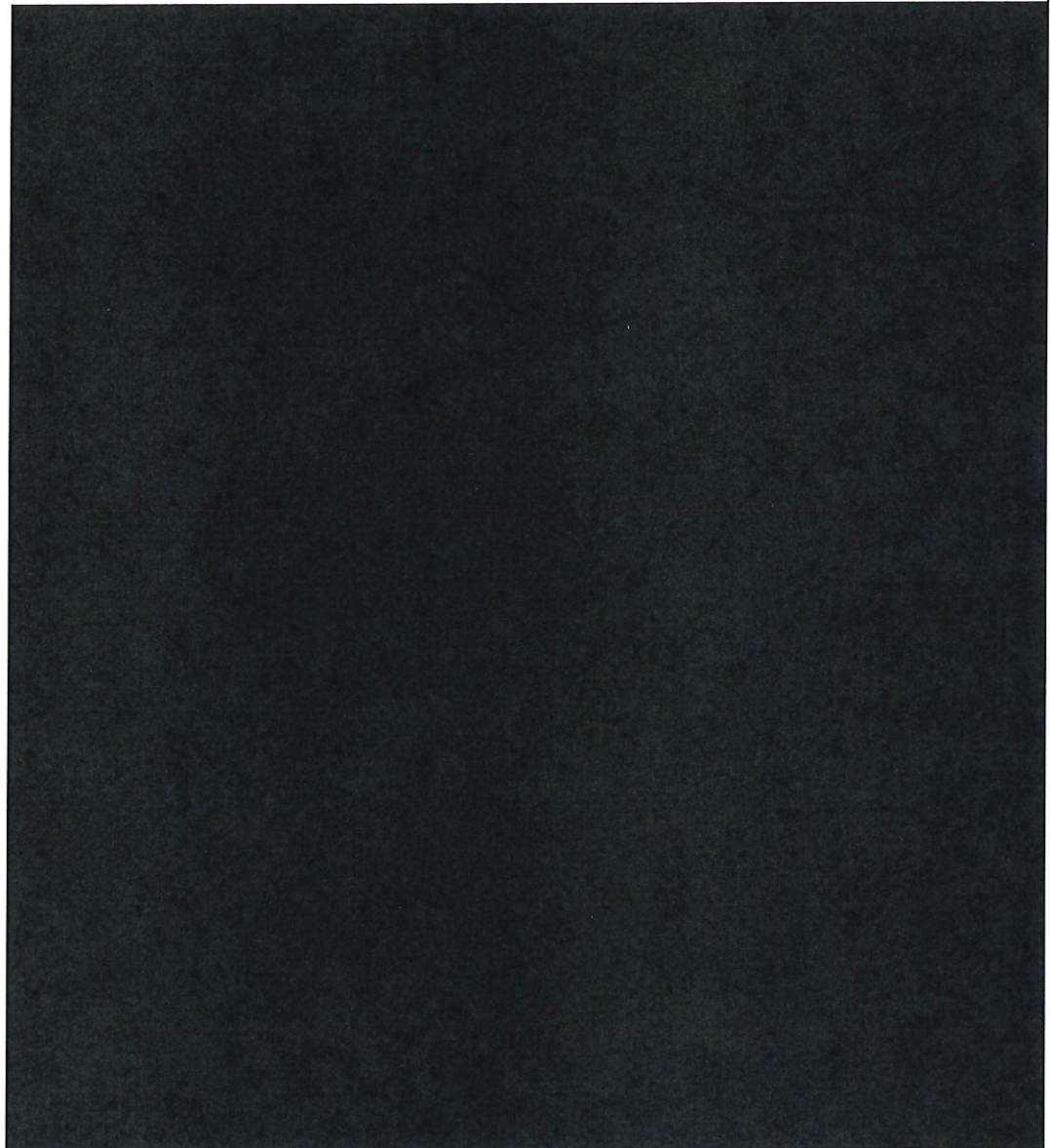
22 Q. Sir, you saw the ages of the people you've hired
23 since this reorganization started yesterday, right?

24 A. Yes.

25 Q. It's much younger than the ages of people terminated,

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Q. All right. So let's go to the second page, these people.

A. Okay.

Q. And while we're going there --

A. Pardon me?

Q. How does this work for employees? In other words, do

1 they put money in that PPM matches? Or just describe
2 kind of how that works.

3 A. We put money in based on their salary or
4 compensation. And it's a percentage of -- they don't
5 fund it at all. We fund it completely for them.

6 Q. So a hundred percent funded by PPM?

7 A. Yes.

8 Q. What determines the level of funding that PPM puts
9 into the individual accounts? And you can refer to
10 the policy if you need to.

11 A. Yeah. There's a -- uh-oh, where was that?

12 Q. It's that one.

13 A. Oh, this one. Sorry.

14 Q. That's all right.

15 A. There are categories or -- I've forgotten the term
16 for it -- groups. There's a summary page somewhere
17 that has that. I hope it's a part of this because I
18 had it at one time.

19 MS. SMITH: Do you mind me pointing to the
20 right page?

21 MR. HERRMANN: Huh-uh.

22 MS. SMITH: Dr. Spivey, you may want to look
23 at page 812.

24 THE WITNESS: Okay.

25 MS. SMITH: That might be helpful. I think

1 that's --

2 THE WITNESS: Oh, there it is. The last page,
3 of course. Thank you.

4 MS. SMITH: Yeah.

5 A. So there are categories. You know what? This is not
6 the one that describes the different groups. Oh,
7 yeah, it is. Okay. "Hypothetical allocation."

8 So there are groups, groups A, B, C, D, and E;
9 and they are allocated as a percentage of their
10 annual compensation based on which group, into which
11 group they -- in which group they lie.

12 Q. Is the A, B, C, D, E grouping purely based on their
13 annual compensation?

14 MS. SMITH: I'm not quite sure I understand
15 that question.

16 Q. How do you group people into A, B, C, D, and E? Who
17 makes that determination? Let's start with who.

18 A. I think they are defined somewhere whereby, for
19 example, A would be owners. Another one would be
20 non-owner, highly compensated -- oh, they're defined
21 right there. So, for example, a non-owner but highly
22 compensated employee such as another physician or
23 midlevel would fall into group D.

24 Group C is lineal ascendants and descendants,
25 which means direct blood relatives, I believe, either

1 sibling or, you know, a child.

2 Q. Okay.

3 A. Group E is all others that don't fall in the other
4 four groups.

5 Q. Would C include Jennifer McGraw?

6 A. Yes.

7 Q. And who would fall, if you know, into group D?

8 A. You mean the name of the individual --

9 Q. Yeah.

10 A. -- or the person? Chad Caldwell, Pamela Campbell,
11 Michael Roche.

12 Q. And what you're just looking at there, that
13 completely -- I'm assuming something here, but I want
14 to see if you agree with it. I'm not trying to throw
15 you off. Does that completely determine the amount
16 that PPM puts in the cash balance plan for the
17 employee, or are there other factors?

18 A. I think it's based solely upon which group and their
19 annual compensation. And the percentage thereof is
20 determined by which group they -- in which group they
21 belong.

22 Q. Are years of service at PPM taken into account?

23 A. In regard to assigning them to a group?

24 Q. In regard to the amount of money that PPM puts into
25 the cash balance plan.

- 1 A. I don't think so.
- 2 Q. Is an employee's age taken into account?
- 3 A. No.
- 4 Q. Let's go back to 814.
- 5 A. I'm sorry. What was the number again?
- 6 Q. So go back to Exhibit 27, and we'll go to 814.
- 7 A. Oh, I'm sorry.
- 8 Q. That's my fault.
- 9 A. Okay.
- 10 Q. So I think it's pretty self-explanatory, the ones
- 11 that say, under the status column, "N=Term
- 12 NonVested." For those people -- correct me if I'm
- 13 wrong -- those would be people who were terminated
- 14 and they also were not a hundred percent vested in
- 15 the plan, right?
- 16 A. Uh-huh.
- 17 Q. Yes?
- 18 A. Yes. I'm sorry.
- 19 Q. That's okay. Where it says "S=Min. Service," do you
- 20 know what that stands for or tries to denote?
- 21 A. I don't. (Witness reviews document.)
- 22 Q. And if you don't know, that's okay.
- 23 A. I said I don't. I'm sorry.
- 24 Q. Oh, you don't know? Okay.
- 25 A. Yeah.

1 A. Looks like Chad Caldwell, \$9,591.28.

2 Q. If someone is a plan participant and they are
3 terminated before 100 percent vesting, what happens
4 to their balance?

5 A. It's my understanding it stays in the fund and is
6 used at -- it's used to fund the plan.

7 Q. What do you mean by that?

8 A. That if and when there are payouts, that money
9 remains in the plan and is used as the payout.

10 Q. Does it go to some other account that -- in other
11 words, is this one big bank account that has all this
12 money in it, and there's just an accounting within
13 it, or are there separate accounts? Tell me a little
14 bit more about that.

15 A. I think it's one account, but honestly, I'm not
16 certain about that. That would be a good question
17 for our third-party administrator. I didn't get that
18 explained to me.

19 Q. So do you -- so if it's in one account -- let me
20 strike that. Someone else will have to answer that
21 question about kind of where the -- I guess we'll
22 call it forfeited contributions go?

23 A. Uh-huh.

24 Q. Yes?

25 A. Yes. I'm sorry.

1 Q. Does it benefit you in any way? Do you know one way
2 or the other? In other words, does PPM get that
3 money?

4 A. I don't think so. I think it just stays in
5 the -- it's my understanding it stays in the cash
6 balance account and is to be used as I described
7 before.

8 Q. Is it accounted for somewhere? I mean, is there a
9 line item saying how much money is in the account
10 that is not assigned to an employee that has been
11 forfeited?

12 A. Yeah. I don't know.

13 Q. Do you know whether or not that money would go to
14 your credit?


15 A. I don't.

16 Q. Why did you -- well, nah. Go to Exhibit 68. So this
17 is an e-mail. It looks like -- well, first I'll say
18 this e-mail was provided to me by your counsel. But
19 the bottom, there's an e-mail from Sue Nagelski to
20 you talking about the EPLI policy and the Sue [sic]
21 Tackett, you know, EEOC matter. Is that a fair
22 summary of that e-mail?

23 A. Does this run bottom to top or --

24 Q. Yeah, bottom to top.

25 A. Okay. (Witness reviews document.) I've read it.

- 1 Q. And I described it as an e-mail from Sue Nagelski to
2 you discussing the EPLI renewal and also the Faye
3 Tackett EEOC matter. Is that a fair summary of this
4 e-mail?
- 5 A. Yes.
- 6 Q. And on January 8th, 2016, you forwarded it to Wendy
7 Yontz, right? If you look at the top, it says
8 "forward."
- 9 A. Yeah, yeah.
- 10 Q. Yeah?
- 11 A. Well, I'm looking. Just a moment, please. Where
12 does it say "forwarded"?
- 13 Q. In the subject, "Fwd."
- 14 A. Oh, EPLI. Okay. Got you.
- 15 Q. So do you agree that you forwarded this to Wendy
16 Yontz?
- 17 A. It looks like, uh-huh.
- 18 Q. And here you said, "I will be sending Sue an e-mail
19 later today terminating her position at the end of
20 January." Right?
- 21 A. Yes.
- 22 Q. Then you go on to say, "Make sure we have all the
23 
24 Correct?
25 A. Yes, yes.

1 Q. Why did you, in your forward of this e-mail to Wendy
2 Yontz, announce that you were firing or planning to
3 fire Sue Nagelski?

4 A.

5

6

7

8

9 since it was still an ongoing thing and since it was
10 an open case and had not been resolved, and Sue was
11 going to be terminated, I felt it important that we

12

13 Wendy could then assume handling of that and
14 interfacing with the attorney and finding out what
15 was going on and so on.

16 Q. When did you decide to fire Sue?

17 A. I guess sometime toward the end of 2015 or early
18 January of 2016.

19 Q. Tell me about that decision. Did you consult with
20 anybody to make the decision?

21 A. Yes.

22 Q. Who did you consult with?

23 A. I consulted with the BB&T people. I consulted with
24 Turlington & Company. That's pretty much it.

25 Q. Did you talk to Sherry Spivey about the decision?

- 1 A. Probably did. And, in fact, I did -- I talked with
2 Mary Benton too.
- 3 Q. The BB&T people, who were the BB&T people? What are
4 their names?
- 5 A. Jonathan Cochrane, Rob Davis. I don't remember if I
6 specifically spoke with Brett Hoge. Probably just
7 those two.
- 8 Q. When did you consult with Jonathan Cochrane?
- 9 A. Sometime before this. I don't know.
- 10 Q. Do you think it was more than a month before this
11 January 8th e-mail?
- 12 A. I don't know.
- 13 Q. Two months before?
- 14 A. I don't know.
- 15 Q. Three months before?
- 16 A. I don't know. Not -- I don't think it was three
17 months before, no.
- 18 Q. Would you put it in late -- let's say the fall of
19 2015? Is that too exact?
- 20 A. It's not too exact. Sometime probably late fall,
21 early -- late fall, early winter of 2015.
- 22 Q. Tell me about the conversation you had with
23 Mr. Cochrane.
- 24 A. It was just basically, "I know that Sue has been sort
25 of a liaison between us and Turlington, our

1 accountancy, Turlington & Company, and you guys."

2 And "Can we do business without someone in that
3 position, without that position?"

4 Q. And what did he say?

5 A. "Yes."

6 Q. Did you request this -- was it a phone call or an
7 in-person meeting?

8 A. Phone call.

9 Q. Did you call him?

10 A. Yes.

11 Q. What prompted you to call him?

12 A. I wanted to make sure, since Ms. Nagelski -- you
13 know, we're, again, right in the middle of this
14 reorganization. Mary Benton and I are looking for
15 where can we cut costs. I knew that Ms. Nagelski's
16 other duties had been reassigned, including HR and
17 IT. And sort of compliance and all that had been
18 reassigned to other folks. And so the remaining duty
19 that she had was this position as the liaison. And
20 so I wanted to make sure that I wasn't going to cast
21 myself off into a sea of -- you know, anyway. I
22 wanted to make sure that we could still communicate
23 and do business and everything, that there wasn't
24 some function that she was performing that would
25 otherwise be required.

- 1 A. I don't.
- 2 Q. And if Sue was the HR person, should she have been
- 3 consulted before these terminations were carried out?
- 4 A. Probably, had she been available.
- 5 Q. Was Sue unavailable by phone when she worked for PPM?
- 6 A. Sometimes.
- 7 Q. How often?
- 8 A. I don't know.
- 9 Q. Can you estimate?
- 10 A. There were times when I would try to get hold of her
- 11 and couldn't. How many times, I don't know.
- 12 Q. Do you think it was more than ten?
- 13 A. No. Well, over what period?
- 14 Q. The whole time she was doing HR.
- 15 A. It was probably ten.
- 16 Q. Did you ever counsel her on that?
- 17 A. Yes.
- 18 Q. Did you ever issue her a written warning on that?
- 19 A. No.
- 20 Q. Did you ever document any of the counseling you gave
- 21 her on that?
- 22 A. No.
- 23 Q. So Rob Davis was the next person that you listed,
- 24 someone you consulted with at BB&T. When did you
- 25 speak with Rob Davis?

- 1 A. About the same time I spoke with Jonathan Cochrane.
- 2 Q. Was it a phone call?
- 3 A. Yes.
- 4 Q. Do you think it was before or after you spoke to
- 5 Cochrane?
- 6 A. Actually, let me back up. I may have spoken with one
- 7 or both of them face-to-face. We had meetings with
- 8 them on a regular basis, and this would have been
- 9 toward the end of the year in '15. It's quite
- 10 possible that both of those conversations were not
- 11 phone calls, but were rather face-to-face.
- 12 Q. Do you think it was multiple conversations or one
- 13 where they were both present?
- 14 A. One. In fact, I'm pretty sure, now that I think
- 15 about it, if I may back up -- sorry, memories come
- 16 back.
- 17 Q. That's okay.
- 18 A. I think it was at one of the meetings that we had,
- 19 you know, where the accountants and we were together.
- 20 Q. So who was present for this meeting?
- 21 A. No, hold on just one moment. Let me think. I'm
- 22 sorry.
- 23 Q. That's okay.
- 24 A. I'm just trying to be as accurate as possible. That
- 25 might not make sense because I certainly wouldn't

1 have had that conversation in Sue's presence, and she
2 might have been there for that meeting. It's
3 possible that it was after the meeting. But my
4 recollection is that there was a conversation in
5 person.

6 Q. And who was there for that conversation?

7 A. Those two, Rob Davis and Jonathan Cochrane.

8 Q. So just to maybe speed this along, what you just
9 described talking about with Cochrane, you talked
10 about the same thing with Davis because it was one
11 conversation?

12 A. Either the same conversation or a similar
13 conversation at a different time, yes.

14 Q. Was there any different input that you received from
15 Rob Davis that you didn't also receive from
16 Mr. Cochrane?

17 A. No.

18 Q. Okay. Who did you speak with at Turlington &
19 Company?

20 A. Scott Hummel.

21 Q. When did you speak to Mr. Hummel?

22 A. Along about the same time period. And it's quite
23 possible that that conversation was face-to-face,
24 too, at or after one of those meetings where we were
25 all present.

1 Q. Do you know whether or not that conversation was with
2 just Scott Hummel, or were other people present?

3 A. Brenda Thrower. I had a conversation with Brenda
4 Thrower too.

5 Q. The same conversation, or was she --

6 A. Pretty much. They're the two folks that we deal with
7 at Turlington & Company.

8 Q. Sure. And I asked that poorly. Was it -- not the
9 content of it being the same, but was it in fact one
10 meeting that you remember that you had with
11 Mr. Hummel and Mrs. Thrower at the same time, or they
12 were separate conversations?

13 A. I don't remember.

14 Q. And what did you speak with Mr. Hummel about
15 regarding Sue Nagelski's termination?

16 A. Well, I didn't ask him about her termination
17 specifically. What I asked was, you know, "Do we
18 need someone in the position of liaison between
19 PPMSC, BB&T, and Turlington & Company in order to do
20 business?"

21 Q. And Mr. Hummel said you don't?

22 A. Correct.

23 Q. And you had the same conversation with Ms. Thrower?

24 A. Correct.

25 Q. And this would have also been in late 2015?

- 1 A. Correct.
- 2 Q. Same question with Hummel, Thrower, and Brown. If
- 3 you need to separate it out, that's fine. Or, sorry,
- 4 not Brown, Davis. Do you know whether or not those
- 5 conversations were before or after Ms. Yontz started
- 6 with PPM?
- 7 A. I'm not sure. About the same time, though.
- 8 Q. Sherry Spivey, I know you said that you got input
- 9 from her too. When did you --
- 10 A. Regarding what?
- 11 Q. Sue Nagelski's termination.
- 12 A. Okay.
- 13 Q. When did you first speak with Sherry Spivey about the
- 14 possibility of terminating Sue Nagelski?
- 15 A. Long time before that.
- 16 Q. When do you think that was?
- 17 A. 2012, 2013. I'm not sure. Well, that may be a
- 18 little early. Probably '13, '14, along in there.
- 19 Q. Going back to 2013 or '14, did Ms. Spivey, back then,
- 20 want to terminate Sue Nagelski?
- 21 A. She expressed -- she didn't specifically say she
- 22 wanted to terminate her, but she expressed
- 23 dissatisfaction with her lack of presence in the
- 24 office. And there were also some communication
- 25 issues between Mrs. Spivey and Ms. Nagelski regarding

1 Q. What was she angry about?

2 A. Sue didn't show Mrs. Spivey the respect that she
3 thought she should, in part, as the clinical
4 coordinator and the wife of the owner of the
5 practice, and someone who is vested in the practice
6 in regards to her livelihood, her ability to live.

7 Q. Was that conversation in person?

8 A. Which conversation?

9 Q. The one that we're describing from late --

10 A. Between my wife and me?

11 Q. Yeah.

12 A. In person, yeah.

13 Q. Was there anything else that she was dissatisfied
14 with that she expressed to you in that conversation?

15 A. Again, time frame here I'm not sure about, but she
16 became very concerned about the e-mail situation and
17 the eBridge account thing, and all of that that I've
18 already described in great detail, I believe, and why
19 one would be concerned about it. She brought that up
20 as a concern.

21 And she would from time to time come to me and
22 say, you know, "Look, I've told you this stuff is
23 going on, and it's a concern and we need to do
24 something about it."

25 And, in part, especially until I began to have

1 some of the same concerns, you know, I tried to act
2 as a peacekeeper, basically. In fact, I had Sue come
3 in one time and had a conference with Sherry and her
4 and acted sort of as a mediator and tried to get them
5 to kiss and make up. This was after we had moved
6 into the new office on Maplewood. You know, this
7 family squabbling and family strife and everything
8 was being created. I was beginning to regret ever
9 having brought anyone that's a member of the family,
10 you know, into the practice.

11 And then, of course, when Ms. Yontz came on
12 board, she's not a blood relative and all that, but
13 still I'm thinking -- anyway. I was just trying to
14 keep peace among the family.

15 Q. When did that meeting where you acted as a mediator,
16 when did that happen?

17 A. I'm not sure. It was after we moved into the new
18 building. We moved in there in January of '14? Yes.
19 So probably in 2014. So some of this had been going
20 on for some time too.

21 Q. Did that predate the first time that Sherry came to
22 you and said she wanted Sue fired, that meeting where
23 you were the peacekeeper?

24 A. Not sure.

25 Q. So I think you said late 2014 or early 2015 was the

1 to look a little more suspicious to me. And so I
2 thought, as a part of the reorganization, this just
3 fits. You know, it's time to cut the cord here.

4 Q. Do you know whether you expressed that you agreed,
5 you know, and she was going to be fired before or
6 after Ms. Yontz started? Because I know that was
7 November of 2015. Or was it just like those other
8 conversations around the same time?

9 A. Well, it may have come up at the time Ms. Yontz was
10 coming on board because that's one of the bones of
11 contention, you know, that we wanted someone, an HR
12 person, on-site, and so now we've got one. So those
13 duties were now reassigned.

14 Although, I will say that Ms. Nagelski -- and
15 that's another thing that became suspicious, by the
16 way. I'll add this, is that Ms. Nagelski was very
17 resistant to turning over payroll to Ms. Yontz. In
18 fact, she said, "I'll give up the rest of HR, but I'm
19 keeping payroll." I'm paraphrasing here.

20 And, in fact, learned later that the way the
21 Flex-Pay account had been set up, I didn't even have
22 access to the account. Only Ms. Nagelski and, I
23 think, one other person. It may have been Vicki
24 Swicegood. But only a few people had access to the
25 payroll account, and I wasn't one of them. And this

1 came up in part at a time when Mrs. Spivey was trying
2 to gain access to check on PTO and things like that.

3 Then when Ms. Yontz came on board, she
4 couldn't -- they wouldn't even talk to her. And when
5 I decided that she was going to assume the role also
6 of payroll, Flex-Pay wouldn't even talk to her. So
7 we had to go through quite an ordeal gaining access
8 to the account and then getting it switched over to
9 our current payroll provider whose name I can't
10 recall. AC something, or whatever it is, ADC or
11 something. So this would have been all around that
12 time and sort of dovetailed, you know.

13 Q. To kind of wrap up, I have one more input person,
14 Mary Benton.

15 A. Uh-huh.

16 Q. When did you first discuss the prospect of
17 terminating Sue Nagelski with Mary Benton?

18 A. Probably mid to late '15. Again, we were looking
19 at -- Mary had come on board to implement the EHR
20 start-up and everything. And we were starting to
21 look at how we could reorganize the practice and save
22 money and make it more effective, more efficient, put
23 in processes that were -- Mary is a very astute
24 businessperson, and she knew -- for example, it was
25 she who pointed out that we had some problems in

1 Q. Sure. Why did you terminate -- well, let me back up.
2 Did you decide to terminate Rebecca Kovalich?

3 A. Yes.

4 Q. Why did you decide to terminate her?

5 A. Because her duties were done, nothing for her to do.

6 Q. Yesterday you heard testimony that she was terminated
7 in -- we'll just call it early June of 2016. Does
8 that sound right?

9 A. Yes.

10 Q. And in relation to that, when did you decide to
11 terminate her employment?

12 MS. SMITH: I do not understand that question.

13 MR. HERRMANN: Sure.

14 Q. Do you agree with me, and even if it's not -- well,
15 do you have any reason to doubt that her termination
16 date was June 6th of 2016?

17 A. I don't.

18 Q. My question is, how long prior to that date had you
19 decided to fire Ms. Kovalich?

20 A. I don't recall, but it was in around that time. We
21 did -- because Ms. Kovalich was more available to
22 come to the office, it seemed, and because she has a
23 residence there in Winston-Salem, I did go through
24 the process of -- as I had in other cases, of having
25 an attorney present and doing a formal sit-down

1 meeting wherein, you know, she was offered a
2 severance package, I believe, and so on.

3 And so that probably took some time to put
4 together, to get that arranged. And so it was
5 certainly not the day before. You know, it would
6 have been a week or two prior to that, I would think,
7 so that we could make the appropriate arrangements to
8 get the attorney and get the separation agreement
9 drawn up and all of that. So sometime before that.

10 Q. Did you say that you fired her because -- well, let
11 me back up. Her termination was part of the
12 reorganization?

13 A. Yes.

14 Q. And her duties had ended? Or what was it you said?

15 A. Her duties had ended, yes.

16 Q. Which duties ended in June of 2016?

17 A. Well, the duties had actually ended before that
18 probably, but it was laboratory development.

19 Q. When did the laboratory development duty end?

20 A. Sometime before that, when I realized that
21 Dr. Scheutzow was not going to be able to do the age
22 management; and so, therefore, the laboratory
23 development that Ms. Kovalich and I had been working
24 on -- and it wasn't just age management. We were
25 also looking at -- we bought a chemistry machine, a

1 Tosoh, T-o-s-o-h, machine, and in fact even had it to
2 the point where it had been -- what's the term? It
3 had been qualified. It had been certified that it
4 was okay to use it to do certain chemistries. And it
5 was a fairly large expense, like \$50,000. So we had
6 been working on that.

7 And then -- but a large part of the use of
8 that machine was going to be to do the chemistries
9 that were required to monitor patients in the age
10 management part of the practice, a part of
11 RegenerAge. And so once I had decided to pull the
12 plug on that -- and then we looked into reimbursement
13 for pain management things that could be done in lieu
14 of or as a less comprehensive laboratory package,
15 such as thyroid function, vitamin D, things like
16 that, testosterone levels, which would have been
17 both, you see. Testosterone would have been both
18 pain management and age management.

19 So we went through that process. And then it
20 didn't look like it was going to be -- that it was
21 not a good return on investment. In fact, it was not
22 going to be a moneymaker. And so once we shut that
23 down, there was no more laboratory development to be
24 done at that time.

25 Q. When do you think that happened? And so for some

1 reference points, June 9th would be Rebecca's --

2 A. Of '16.

3 Q. Of '16 --

4 A. Right.

5 Q. -- is the termination date. Sue's termination
6 date --

7 A. January.

8 Q. -- I guess the official, January, you know.

9 A. Right.

10 Q. Between the two of those or even before?

11 A. Well, quite honestly, the decision to not do any more
12 lab development was probably earlier than that, and
13 so -- but Ms. Kovalich, I kept paying her because, in
14 part, her salary was to compensate her for things
15 that she had done earlier on in the practice for
16 which I felt she had not been adequately compensated.

17 For example, when she came in and straightened
18 out the Carolina Liquid Chemistries' BioLis machine
19 that had the problems with the software, that's when
20 she came back into the practice, when we were over at
21 the old office. And she didn't -- she got very
22 little, if any, compensation for that. She said at
23 the time -- and I believe that -- I believe that she
24 had missed being in the game. And she had had some
25 time off and done some traveling, and she was kind of

1 anxious to get back in the game. And it was exciting
2 for her to do that, and she enjoyed it.

3 She was also learning about urine toxicology
4 testing, which although she had a lot of experience
5 with lab, she had not done heretofore, and neither of
6 us had. And so we were kind of learning that
7 together. And Dickson Capps would come in, and we
8 were figuring out how to do all of that. It was an
9 exciting time.

10 And then when we decided to do the LC-MS, when
11 it became more doable because the cost of the machine
12 had come down, plus Ms. Kovalich's relationship with
13 Ernie Knesel at Select Laboratory. He became a
14 broker or -- I'm not sure what the terminology was,
15 but for the Shimadzu machine, which was a less
16 expensive liquid chromatography tandem mass
17 spectroscopy machine. It's like half the cost.
18 Instead of a million dollars, it's about half a
19 million.

20 So we had been doing that, and she had helped
21 us get that. And, of course, the laboratory, as I
22 have said more than once, was generating over half
23 our revenue. So I was indebted to her for that.

24 And by way of explanation of why she didn't
25 want any compensation or more reasonable compensation

1 back then, she was learning from us, as we were
2 learning from her. And, plus, I believe that our
3 introduction of urine toxicology testing gave Select
4 Laboratory, with whom she had a relationship, an
5 opportunity to develop their business in that area.
6 In fact, I know it was so because I went and had
7 dinner meetings with Ernie Knesel and John Merritt
8 more than once. Went over to the lab and met with
9 them and gave them information about what would be
10 tested and why it was important and what pain
11 management meetings they could attend in order to
12 promote their business and all that. And so I think
13 that that sort of perhaps raised her value with
14 Select Lab a little bit, and, you know. But so,
15 anyway, I felt that she had not been adequately
16 compensated during that time.

17 I think, also, she was grateful to us for
18 bringing Suzanne in and giving her an opportunity for
19 employment and some experience after she had finished
20 her MBA. So, you know, it was a win-win situation,
21 so to speak.

22 But I didn't think that she -- in fact, at one
23 point I offered her, which I have learned since was
24 foolish -- she probably couldn't have, but I offered
25 to -- because this was a physician-owned laboratory,

1 I offered to, you know, have her -- to give her part
2 of the lab business, you know. But she said no, that
3 would be a tax issue. I offered to give her a lump
4 sum, and she indicated that would be a tax issue for
5 her. And so we agreed to a pay of \$5,000 a month for
6 some period of time until we felt that she was
7 adequately compensated. I remember her comment at
8 that time. She said, "That's a good start."

9 So, anyway, so part of the reason for
10 continuing to pay her, even though her duties were
11 done, essentially, was that I wanted to make sure
12 that I had adequately compensated her. Now we're
13 getting into the area where we're reorganizing, the
14 reimbursement is dropping, we're getting into trouble
15 financially, and we see that on the horizon, if not
16 happening already. And so it became time to take a
17 closer look at that, and so we did.

18 Q. Okay. And you think those duties you described ended
19 in early 2015, or roughly when do you think that sort
20 of lab development was over?

21 A. I'm not sure. I was thinking maybe we could look at
22 Dr. Scheutzow's termination, but I kept him on for
23 some time after that, as I said, because he was doing
24 other things. It probably would have been -- I'm not
25 sure. We probably made the decision to not continue

1 with age management in the lab maybe in -- yeah,
2 sometime in '15. I'm not sure.

3 Q. Do you think that was before or after firing the
4 three Greensboro employees?

5 A. That what was before?

6 Q. The decision --

7 A. That we decided to stop developing the lab?

8 Q. Yes.

9 A. I'm not sure.

10 Q. Could it have been about the same time?

11 A. Could have been.

12 Q. So let's take a look -- I don't know if we've done it
13 yet, but it should be in the book -- at the -- back
14 to Number 5, Exhibit 5. And go to page 9.

15 A. Okay.

16 Q. And on page 9, do you see an interrogatory that asks
17 to identify individuals who had direct or indirect
18 input into your decision to terminate Plaintiff
19 Kovalich's employment?

20 A. Yes.

21 Q. And then there are -- Sherry Spivey, Mary Benton,
22 Gretchan Culler Hawks, Rodney Leftwich, and Steven
23 Wong are all listed?

24 A. Yes.

25 Q. Is that accurate, that those people had input in the

1 decision to terminate Ms. Kovalich?

2 A. Yes, except somewhere in here I thought it said
3 either -- oh, it does say direct or indirect. Yes.

4 Q. Yeah. And we'll get into that. I just want to go
5 through each one.

6 A. Yeah.

7 Q. So Mary Benton, when did you first specifically
8 discuss the prospect of terminating Rebecca
9 Kovalich's employment? When did you first have that
10 conversation with Mary Benton, if you did?

11 A. Probably early '16, spring of '16.

12 Q. Okay. And do you recall one conversation or multiple
13 conversations about that with Mary Benton?

14 A. More than one.

15 Q. The first one that you recall, do you know if that
16 was in person or over the phone?

17 A. They were all in person.

18 Q. What do you recall about the first conversation where
19 you specifically talked about terminating
20 Ms. Kovalich?

21 A. Mary Benton, as a part of the reorganization process,
22 said, "Why are you paying her? What is she doing?"
23 And I explained that she was very essential in our
24 development of the laboratory and that I was
25 continuing to pay her for the reason I've already

1 described, to which Ms. Benton likely replied,
2 "You've got a business to run here and you're about
3 to run it into the ground. You better -- you've got
4 to look at this a little more carefully." So --

5 Q. Before Mary Benton made that recommendation, had you
6 considered terminating Ms. Kovalich?

7 A. Yes. I considered a lot of different people,
8 terminating a number of different employees.

9 Q. When was the first time that you considered
10 terminating Ms. Kovalich?

11 A. Probably in mid to late 2015.

12 Q. Do you recall a second meeting with Ms. Benton where
13 you discussed terminating Ms. Kovalich?

14 A. I recall several meetings with Ms. Benton wherein we
15 discussed how we needed to reorganize. And
16 specifically about Ms. Kovalich, no. I do recall
17 that she sent me an e-mail expressing some concerns.
18 That may be one of the -- I don't know. I recall
19 seeing an e-mail where she expressed some concerns
20 about, you know, "Why are you still paying her?"
21 Again, same sort of idea. And -- anyway.

22 Q. Would that e-mail have happened after your in-person
23 talk where she said, "Why are you paying her? What
24 is she doing"?

25 A. Most likely, yeah. I'm not certain of that, but most

1 likely.

2 Q. What else do you recall about your conversations with
3 Mary Benton regarding terminating Rebecca Kovalich?

4 A. I don't recall any other specifics.

5 Q. Okay. Sherry Spivey, what input did she have into
6 the decision to terminate Ms. Kovalich?

7 A. Well, again, direct or indirect input, I'm sure that,
8 you know, the whole mistrust issue and everything,
9 she probably brought that up more than once, and also
10 probably brought up, you know, our revenues are
11 dropping. So Ms. Spivey, you know, has some
12 information about what's going on with the practice
13 because we live together and I talk to her about
14 things, you know. And so she probably heard me say
15 that we're looking at this, we're looking at that,
16 revenues are dropping, here's why. And so she may
17 have said at some point, "Then why are you keeping
18 Ms. -- why are you keeping Rebecca on board?"

19 Q. Do you recall her saying that?

20 A. Not specifically, no.

21 Q. So do you know one way or the other whether she ever
22 said that to you?

23 A. No.

24 Q. Do you know if she ever recommended terminating
25 Ms. Kovalich to you?

1 A. Specifically, no, I don't.

2 Q. And from your answer, I just want to clarify. It's
3 possible she did and it's possible she didn't?

4 A. Yes.

5 Q. You just don't remember?

6 A. Yeah.

7 Q. Okay. Gretchan Culler Hawks, what input did she have
8 into the decision to terminate Ms. Kovalich?

9 A. I asked her if the lab was able to run okay if
10 Ms. Kovalich was gone.

11 Q. When did you ask her that?

12 A. I don't remember. Sometime probably around the same
13 time I was talking with Ms. Benton about
14 reorganization, so probably -- it may have been on
15 into 2016. Sometime late '15, early '16.

16 Q. What did she say in response?

17 A. She said that the lab could run okay, that a lot the
18 duties she was doing -- she was doing a lot of the
19 ordering herself and things like that. And Select
20 was doing all the compliance, regulatory things, and
21 so -- that was my understanding at the time. And so
22 it didn't look like the position was necessary. If
23 we weren't developing any new things, if the lab was
24 just sort of running on its own, that they were okay.
25 She is a medical technologist and is certainly

- 1 A. May 24th of '16?
- 2 Q. No. May 27th of 2016.
- 3 A. Oh, filed, yes. Okay.
- 4 Q. And prior to this EEOC charge being filed, for at
- 5 least two months before this, you were aware that
- 6 Ms. Nagelski was asserting age discrimination claims
- 7 and other legal claims related to her termination
- 8 against PPM, right?
- 9 A. Well, I recall getting a -- receiving a letter from
- 10 your firm, maybe from you personally.
- 11 Q. Yeah.
- 12 A. I think it was in February.
- 13 Q. Yeah. Let's go to Exhibit 90. That will just help
- 14 refresh. You can keep answering, but just flip to
- 15 that.
- 16 A. Okay. Sure. 9-0?
- 17 Q. 9-0.
- 18 A. I don't have that.
- 19 Q. I see it there. It might be under 91.
- 20 MS. SMITH: I don't know that that's the right
- 21 number because I've got 90 as the cash
- 22 balance plan.
- 23 Q. Oh, 91. 91. Sorry.
- 24 A. 91? Okay.
- 25 Q. Yeah. My fault.

1 A. Yes.

2 Q. Why?

3 A. Because, despite the more recent sort of ill will or
4 whatever between Sherry and Suzanne in particular,
5 and some things that went on even between Suzanne and
6 me, like some disrespect, I thought, and so forth and
7 so on, I felt that our relationship was still pretty
8 good. I thought I had done a good job of letting her
9 know in advance. She knew that a lot of her duties
10 had been reassigned. She, I believe, had knowledge
11 of the fact that, you know, our revenue, we were
12 going to have problems with revenue going forward and
13 everything with the lab and all. And particularly
14 since mother/daughter, I'm sure that Ms. Kovalich let
15 her know about those things.

16 And so in the letter that I had sent her --
17 although I will admit, I could have done a better job
18 of that -- I was trying to sort of be conciliatory
19 and offer an olive branch. And it surprised me,
20 quite frankly, that she had done this. So I was
21 surprised by it.

22 Q. Did it upset you?

23 A. A little bit.

24 Q. How so?

25 A. I was kind of hurt, actually.

1 VIDEOGRAPHER: On record at 6:02 p.m.

2 By Mr. Herrmann:

3 Q. I think before the break, I think you said you had
4 some regrets about the way you terminated
5 Ms. Nagelski and you could have done it better. And
6 I think you explained what you meant by that. You
7 could have sat down with her or something like that.
8 Is that right?

9 A. Yes.

10 Q. Why do you think it would have been better to sit
11 down with her?

12 A. More personal, personable, you know. It's kind of
13 hard to convey things adequately in a letter. Part
14 of my reasoning at the time was spiteful, to a
15 certain extent, in that she can't come here when I
16 need her to be here, so I'm not going to go to her or
17 set up a meeting face-to-face. I'll just send her
18 this letter, you know?

19 Q. Uh-huh.

20 A. But I thought that I had been adequately conciliatory
21 and all that. In retrospect, I probably could have
22 done a better job of it.

23 Q. Did you consider giving her a phone call?

24 A. No.

25 Q. Is that something else you think you could have done

1 A. If you say so.

2 Q. Go ahead and take a look at it.

3 A. I'll take your word for it.

4 Q. Well, go ahead and look at Exhibit 20.

5 A. All right. We're talking Cindy Ingold, right?

6 Q. Yeah.

7 A. Okay. (Witness reviews document.) Yes.

8 Q.

9

10

11 A.

12 Q. Now, was it different for you when you learned that
13 Ms. Nagelski had accused PPM of age discrimination
14 than it was for these other employees that had done
15 it?

16 A. Yes.

17 Q. Why so?

18 A. Because I felt that we had a -- we, as a practice,
19 and we, as a family, and I personally had a different
20 relationship with her than I did with these other
21 employees. She was family. She had a special
22 status, if you will.

23 Q. And when you learned that she had accused PPM of age
24 discrimination, her mother was still working for PPM,
25 right?

1 A. Yes.

2 Q. I mean, maybe it's just a normal reaction. But, I
3 mean, was that awkward for you?

4 A. A little bit, yes.

5 Q. What do you mean by that?

6 A. Well, I was concerned that -- well, two things. One,
7 I percolated and -- not percolated. I thought about
8 this, you know, for some time, so it wasn't an
9 immediate thing. But I wanted to talk with Sue. But
10 I knew that I couldn't because she started this
11 action. So now it's too late. I can't go back. I
12 can't talk with her.

13 But I knew that her mother and she, most
14 likely, communicated fairly regularly. So I called
15 Ms. Kovalich, and I said to her, basically, "I don't
16 understand why Sue has done this. Please make sure
17 she has read my letter carefully," and that --
18 because in my mind at that time, I wasn't even
19 terminating her. I realize now that it was a
20 termination of employment. But I guess in my mind at
21 the time, there was more of a, "Hey, let's still work
22 together, but on a different -- with a different
23 business arrangement," sort of as on a project basis,
24 let's say.

25 So all I -- what I asked Ms. Kovalich to do

1 is, "Please make sure Suzanne has read this. I know
2 I can't talk with her because of this. Please make
3 sure she's read this." And that was about it.

4 There was a later conversation wherein -- as
5 you said, it was awkward that Ms. Kovalich was still
6 employed and we had terminated her daughter. And
7 Ms. Kovalich was in a position where, at that time
8 with the lab and with our relationship with Select
9 Laboratory and all of that, where if she had wanted
10 to retaliate against us for firing her daughter, my
11 concern was that she could hurt us. She could have
12 sabotaged the lab. She could have -- I don't know.
13 I don't mean, you know, mechanically sabotaged it.
14 But I really didn't feel that she would do that
15 because, as I had said before, I had a lot of respect
16 for her as a businesswoman and all that.

17 So as I thought about this, I thought,
18 "There's really no way I can make this perfectly safe
19 for us," but what I wanted to do was just hear from
20 her that despite the fact that I had terminated
21 Suzanne, that she was still in our camp and would
22 still do the -- you know, not do anything to sabotage
23 our laboratory billing. Because, again, even though
24 our revenue was dropping as a result of the changes
25 in reimbursement for laboratory services, it

1 still -- and still is an important part of our
2 revenue stream for the practice. It allows us to do
3 other things that we don't get paid for.

4 So I called her back and I just said, "I need
5 to hear from you that my firing of Suzanne is not
6 going to cause you to do anything to retaliate
7 against us, to do anything to hurt us. I just need
8 to hear you say that." And she did. And I said,
9 "Thank you." And that was it.

10 Q. Was Ms. Spivey around when you were talking -- when
11 this second call happened; in other words -- let me
12 clarify. During Ms. Kovalich's deposition, I think
13 she testified to not the exact conversation but
14 something similar. But one thing she said was that
15 Ms. Spivey was in the background also expressing
16 fears about retaliation.

17 A. I don't recall that at all.

18 Q. You don't recall that testimony?

19 A. Yes, I recall the testimony.

20 Q. Do you know one way or the other whether Ms. Spivey
21 was there when you had that conversation with
22 Rebecca? And by "there," I mean like close in
23 proximity to you.

24 A. The first -- I know I've muddied the waters here with
25 my --

- 1 Q. That's okay.
- 2 A. The first phone call or the second one?
- 3 Q. Yeah. Let's go through both of them.
- 4 A. Okay.
- 5 Q. So was Ms. Spivey present -- and when I say
- 6 "present," again, let's say within the same room as
- 7 you.
- 8 A. Earshot?
- 9 Q. Earshot. That's a good way to put it. Was she
- 10 within earshot of you for the first call?
- 11 A. No.
- 12 Q. Was she within earshot of you for the second call?
- 13 A. No.
- 14 Q. Are there any other calls that you're aware of?
- 15 A. No. Well, what do you -- time out. Calls to
- 16 Ms. Kovalich about those two subjects?
- 17 Q. Yes.
- 18 A. No.
- 19 Q. When in relation to receiving this -- because I know
- 20 you said that you were aware that Sue was
- 21 represented, so you couldn't talk to her.
- 22 A. Right.
- 23 Q. How long do you think after receiving this that you
- 24 made that first call to Rebecca?
- 25 A. I think it was after I had received the second letter

1 her to intervene on my behalf and beg Sue, or
2 whatever, to drop these. And I never did that.

3 My recollection is that the main thrust of my
4 conversation, the main point, was please make sure
5 Sue has read this. Because, again, I thought that
6 I -- you know, I was a nice guy and had offered her a
7 conciliatory letter. And I felt bad about having to
8 terminate her, but -- anyway. So I did not ask
9 Ms. Kovalich to intervene, to talk Sue out of
10 anything.

11 Q. Sure.

12 A. I mean, here's the thing. She had already done it.
13 How could I have her undo it, was the way I was
14 thinking. It was already done. She had already
15 retained an attorney. And at that point, had she
16 already filed an EEOC complaint? I think she had.
17 So the ball was rolling. But I just wanted her to
18 look over things, to make sure that she understood,
19 had read the letter.

20 Q. Yeah. Just to refresh your recollection, go back to
21 Exhibit 13.

22 A. Which one?

23 Q. 13.

24 A. Okay.

25 Q. Just to show you that Sue's EEOC charge was filed in

1 messages to Ms. Spivey. And, you know, these are
2 different, but have you seen these text messages
3 where it says, "Rebecca, my beauty, object of my
4 desire, your wannabe lover"?

5 A. Yes, I have.

6 Q. And do you deny sending those to Ms. Kovalich?

7 A. I do not.

8 Q. Do you feel it was appropriate to send those to her?

9 A. Yes and no.

10 Q. And you can go ahead and explain that.

11 A. Okay. Ms. Kovalich and I had a mutual admiration
12 society sort of thing. I admired her for her
13 business acumen and for her success in basically a
14 male-dominated field of laboratory medicine. I
15 admired her people skills. I think she admired
16 my -- or at least she said so -- entrepreneurial bent
17 and my willingness to take risks, you know, and
18 develop the business, the practice. And she greatly
19 assisted me in that.

20 We teasingly sent each other these messages,
21 which you will note in the ones from me, in the body
22 of it, it's all about business, questions about labs
23 and all that. But basically there would be
24 salutations there, things like "my beauty" and things
25 like that. And I would sign off with other things,

1 Certainly didn't say anything to Rebecca about
2 having given her a chance, and certainly did not mean
3 to imply that she had had a chance to have a
4 relationship with me. And that was it. So I deny
5 that emphatically.

6 Q. Did Mary Benton take over some of Rebecca Kovalich's
7 tasks, as paragraph 38 alleges?

8 A. Let me think a minute. It was '14. 2014?

9 Q. Well, just for this question, I'll say forget the
10 year here. Was there any point where Mary Benton
11 took over some of Rebecca Kovalich's tasks?

12 A. Only in that historically Ms. Kovalich had been a
13 mentor and consultant regarding business things and
14 business development; in particular, lab development.
15 And insofar as Ms. Kovalich in the past had helped us
16 in terms of reorganization of the practice, not
17 insofar as savings because of reimbursement loss and
18 all that, but rather -- you know, she came in even
19 back when we were at the old building, and I didn't
20 know how to run an office. I didn't know who should
21 be doing what, and she did. And so she helped us
22 assign people to different duties and sort of
23 reorganize our work flow.

24 So when Ms. Benton, in '14 -- I don't think
25 the date is right. I think she came back on board in

1 '15 as we were implementing the EHR, so that date may
2 be wrong. But certainly, once Mary Benton was back
3 in doing that, she did assist us in that same sort of
4 thing. She certainly had nothing to do with the lab.
5 And at that time Ms. Kovalich's duties were
6 essentially lab development, so I don't see how Mary
7 Benton could have done any of that.

8 Now, let's see. After Ms. Kovalich was
9 terminated, my recollection is that Ms. Benton did
10 sit in a time or two, was a part of the conversations
11 with Dr. Scheutzow, you know, when we were still
12 trying to get that going. So, I mean, we strung that
13 along for a long time. And it may have been after
14 '16, after June '16, when Ms. Kovalich was terminated
15 that Mary Benton was doing that. But I don't know if
16 that refers to that or not.

17 Q. Paragraph 39 on page 9.

18 A. May we return to 38 for a moment?

19 Q. Oh, sure.

20 A. I completely dispute the statement that Mrs. Spivey
21 took control of the lab.

22 Q. Okay. Why?

23 A. She has no lab experience. She has nothing to do
24 with the lab. Certainly couldn't take control of it.

25 Q. Was there a time -- I know the answer to this. I

Dr. Spivey Dep. Ex. 27
PPM Cash Balance
Plan 2017

FILED UNDER
SEAL

**Dr. Spivey Dep. Ex. 90
PPM Cash Balance
Plan – Summary Plan
Description**

**FILED UNDER
SEAL**